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NO. 81-2386

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHILIP DEL COSTELLO,

Petitioner

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Is the state arbitral limitations period explicated in United Parcel Service v. Mitchell, 451 U.S. 56 (1981) applicable to both the Company and Union when a fair representation suit is filed against both of them?

(2) Should the limitations period for bringing fair representation suits be borrowed from the National Labor Relations Act rather than state statutes for vacating arbitration awards?

(3) Assuming arguendo that the federal statutes are not the appropriate limitations periods, should this Court's Decision in United Parcel Service v. Mitchell, 451 U.S. 56 (1981) be given prospective or retrospective effect?

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PARTIES IN THE COURT OF APPEALS

Petitioner, Philip Del Costello, was the Plaintiff before the United States District Court for the District of Maryland and Appellant before the Court of Appeals for the Fourth Circuit.

Anchor Motor Freight, Inc., was one of the defendants in the District Court. The other defendants were Local 557 of the International Brotherhood of Teamsters and International Brotherhood of Teamsters.

On appeal before the Fourth Circuit Court of Appeals, defendant Employer and defendant Local 557 were appellees.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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BRIEF FOR PETITIONER

Petitioner, Philip Del Costello, hereby submits his brief on the merits in the above matter.

OPINIONS BELOW

The opinion of the United States District

Court for the District of Maryland (B-3-29)[1] granting Defendants' Motion for Summary Judgment has been officially reported in 524 F.Supp. 721 (1981). The opinion of the United States Court of Appeals for the Fourth Circuit B-1 and 2, confirming District Court has not been officially reported.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1981 (B-1).[3] On June 29, 1982, within 90 days of the date of the Court of Appeals decision, Philip Del Costello filed a timely appeal for a Writ of Certiorari pursuant to 28 USC 210 (1)(c), Supreme Court Rules 20.2 and 20.4.

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[1] Denotes pages in the Petition for Writ of Certiorari.

[2] Denotes pages in the Petition for Writ of Certiorari.

[3] Denotes pages in the Petition for Writ of Certiorari.

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 301(a) of the Labor Management Relations Act of 1947, 29 USC 185(a) provides, in pertinent part, as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 160(b) of the National Labor Relations Act of 1947 provided, in pertinent part:

> "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board... ."

Section 5-101 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, in pertinent part, provides:

> "A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."

Section 3-224 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, in pertinent part, provides:

> "(A) Petition (1) except as provided in ¶(2) a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner; (2) if a petition alleges corruption, fraud, or other undue means, it shall be filed within 30 days after the grounds become known or should have been known to the petitioner."

Section 3-206(b) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, in pertinent part, provides:

> "(B) Agreement between employer and employees of this subtitle does not apply to an arbitration agreement between employer and employees or between their respective representatives unless it is expressly provided in the agreement that this subsection shall apply."

STATEMENT OF THE CASE

Petitioner Philip Del Costello began working for Anchor Motor Freight as a car hauler after his tour of duty in Viet Nam in 1973.

Dissatisfied with the representation provided by Local 557, locally, and by the Teamsters nationally, Del Costello was an active member of PROD, a national organization of dissident Teamsters. He was particularly active in campaigns to improve truck safety.

On June 27, 1977, Del Costello was assigned to drive a load of automobiles from Baltimore to Montreal, Canada. Before beginning his journey, Del Costello performed the pre-trip inspection required by federal regulations. Barrentine v. Arkansas Best Freight, Inc., 101 S.Ct. 1437 (1981). He noticed a large number of safety defects, including the ratchets which hold the cars down onto the truck. Because Del Costello had previously

been injured by defective ratchets, he refused to take a truck in that condition. (JA 75) The company supervisor refused to correct the most serious of these problems, despite the urgings of his own mechanic. (JA 16, 74) Del Costello offered to take any other truck on the premises (JA 17), but the company was adamant. When Del Costello persisted in his refusal, he was promptly fired. (If the incident occurred today, he would be protected by the Truck Safety Act of 1982 §405(a).[a] Del Costello also filed a charge with the National Labor Relations Board accusing Anchor of discharging him because of his dissident activities. The Board deferred the charge because a grievance was pending following the doctrine of Collyer Insulated Wire, 192 NLRB 837, 77 LLRM 1931 (1971).

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a. Conference Report HR-6221 Congressional Record, December 21, 1982, adopted by the House of Representatives on December 21, 1982; adopted by the U.S. Senate on December 23, 1982.

He then filed a grievance which was not resolved by an informal meeting between Business Agent Morningstar and company officials (JA 18).

Accordingly, a second level hearing was scheduled on July 19, 1977, less than a month after his discharge in Atlantic City, New Jersey, at a meeting of the Eastern Conference Joint Automobile Transporters Committee. (JA 27,70-79). The Joint Committee consisted of an equal number of union and company representatives. (JA 70) Prior to the hearing, Morningstar conducted no investigation of the facts (JA 24, 81, 82) and, at the hearing Del Costello was only permitted to read a one page statement. (JA 73-76) Morningstar also refused Del Costello's request long before the hearing to call as a witness or obtain a statement from the mechanic who had told the company that it must repair the truck properly. (JA 24, 25) The only evidence introduced by the company was a

statement by a company supervisor who was not present during Del Costello's dispute with the company. (JA 27, 81)

Although the Joint Committee's rules forbid the introduction of this kind of hearsay testimony (JA 98), Morningstar refused to object to this testimony. (JA 70-79, 31) After the Committee upheld his discharge, Del Costello received a letter from Morningstar on August 19, 1977, leading him to believe that the Joint Committee decision was not final (JA 64,65,69) The letter invited him to make any desired additions, deletions, or corrections to the enclosed minutes, in writing, by September 20, 1977, when the Eastern Conference was scheduled to meet. Otherwise, the minutes would be approved as is. (JA 64, 65, 69)

Del Costello complied with this request by his letter of September 14, 1977, to Morningstar (JA 80-84), in which he objected

to excludible hearsay testimony which was the only evidence against him. (JA 81)

The failure of the Union to respond to this letter impelled the District Court to conclude that limitations for the purpose of deciding the motion for summary judgment was tolled until December of 1977 (Petition for Writ of Certiorari B-27). Del Costello promptly filed this action on March 16, 1978, only eighty-eight days after he learned from Morningstar that the Joint Committee's action was final. (JA iii,159) On October 22, 1981, the District Court granted the respondents' motion for summary judgment, holding that limitations began to run in December of 1977 and applied the Maryland 30-day statute for vacating arbitral awards as to both the company and the union (Petition for Certiorari B-16-29). The U.S. Court of Appeals for the Fourth Circuit affirmed the decision of the District Court in

an unpublished opinion on April 19, 1982 (Petition for Certiorari, B-1 and 2).

SUMMARY OF ARGUMENT

I. This Court should adopt the six month limitation period in ¶10(b) of the National Labor Relations Act because the hybrid cause of action in this case is judicially implied from the National Labor Relations Act. The adoption of a six month limitation period would enhance the policy of rapid disposition of labor disputes, and would achieve uniformity and stability in collective bargaining relationships.

However, if this Court believes it is bound to adopt a state statute of limitations, it should borrow a limitations period such as the state tort statute that does not effectively eviscerate the cause of action.

II. If this Court selects the state arbitral limitations period, such statute should

be applied perspectively because when petitioner's cause of action arose, a substantial number of circuit, district and state appellate courts applied the tort/contract limitations period based upon this Court's decisions in Auto Workers v. Hoosier Cardinal, supra, 383 U.S. 696 (1966)and Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), which did not foreshadow the decision in UPS v. Mitchell, 451 U.S. 56 (1981), which was a case of first impression before this Court.

Since the petitioner filed suit in an expeditious manner within two-and-a-half months after he had reason to believe his cause of action arose, it would be extremely unfair to terminate his claim by retrospective application of any limitations period.

I. ARGUMENT

THE LIMITATION PERIOD FOR BRINGING A HYBRID CAUSE OF ACTION ALLEGING BREACH OF DUTY OF FAIR REPRESENTATION AND BREACH OF CONTRACT SHOULD BE BORROWED FROM §10(b) OF THE NATIONAL LABOR RELATIONS ACT. (29 USC §160(b)).

The District Court concluded that the most appropriate state statute of limitations which applies to both the union and the employer was the Maryland 30-day limitation period contained in §3-224(a) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland for the vacating of arbitral awards.

The petitioner shall demonstrate that the District Court was in error, and that §10(b) of the NLRA provides the applicable statute of limitations for such claims. The question of whether §10(b) or a state limitations period applies to this hybrid cause of action was expressly left open by this Court in United Parcel Service v. Mitchell, 451 U.S., at page

60, fn.2.[1]

Where the cause of action, as in the present case, is judicially implied from the NLRA, Vaca v. Sipes, 386 U.S. 171 (1967), and enforceable through the Labor Management Relations Act of 1947 which does not contain a limitation period for private causes of action, the Court should look to the closest analogous statute for purposes of selecting the appropriate limitations period. Auto Workers v. Hoosier Cardinal, 383 U.S. 696 (1966), commenced this process of characterizing actions for suits

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[1] The American Federation of Labor and Congress for Industrial Organizations has filed a Brief arguing that in cases such as the present, Courts should apply the six month limitation period found in 10(b) of the NLRA 29 USC 160(b). The AFL-CIO distinguishes UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), in which the Court had applied state law to a 301 claim on the ground that Hoosier Cardinal involved a 301 action by a union against an employer, while actions brought by employees was against both union and employer .... are hybrid

initiated under §301 of the LMRA. Hoosier involved a straight breach of contract damage suit brought by a union against an employer which did not proceed through the arbitral process unlike the present case which did proceed through an "arbitral process".

This Court, in Hoosier, supra, declined to judicially create a uniform limitations statute for all 301 actions, indicating that the selection of the contract limitations period was limited to the facts before them, and the Court added the following caution for future cases:

> "THE PRESENT SUIT IS ESSENTIALLY AN ACTION FOR DAMAGES CAUSED BY AN ALLEGED BREACH OF AN EMPLOYER'S OBLIGATION EMBODIED IN A COLLECTIVE BARGAINING AGREEMENT. SUCH AN ACTION RESEMBLES AN ACTION FOR BREACH OF CONTRACT COGNIZABLE AT COMMON LAW.

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fn.1 cont'd.
breach of duty actions, the union's duty being implied from the NLRA. "We decline to consider this argument since it was not raised by either of the parties here or below."

> WHETHER OTHER 301 SUITS DIFFER FROM THE PRESENT ONE MIGHT CALL FOR THE APPLICATION OF OTHER RULES ON TIMLINESS, WE ARE NOT REQUIRED TO DECIDE, AND WE INDICATE NO VIEW WHATSOEVER ON THAT QUESTION (383 U.S. at 705, n.7).

In this case, Del Costello's discharge was submitted to a joint committee under the labor management contract, and resolved against him, giving rise to his claim against the union for breach of its fiduciary duty of fair representation and an action against the employer, Anchor, for alleged conduct resulting in a breach of the labor management contract. As this Court has recognized, the plaintiff's two claims have entirely different statutory sources and jurisdictional bases -- the duty of fair representation is implied from the NLRA and the breach of such duty may constitute an unfair labor practice. International Brotherhood of Electrical Workers v. Foust, 442 U.S. 48, note 8 (1978). Syres v. Oil Workers, 350

U.S. 892 (1955). Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Vaca v. Sipes, 386 U.S. 170, at p. 177 (1967). Furthermore, this Court, in United Parcel Service v. Mitchell, supra, at 451 U.S. p. 63, recognized:

> "That the duty of fair representation is more a creature of labor law as it is developed since the enactment of §301 than it is of general contract law."

Justice Stewart, in United Parcel Service v. Mitchell, supra, at 451 U.S. p. 67, demonstrated why the application of 10(b) to fair representation claims accords with Congressional intent. He noted that 10(b) reflects the Congressional judgment as to the appropriate limitations period for unfair labor practice claims, in Mitchell, supra, 451 U.S. at p. 67, and observed that the Labor Board has ruled, with approval of a majority of the Court of Appeals, that all violations of the duty of fair representation are unfair labor practices,

and thus are the very type of wrongs as to which 10(b) controls; ibid., at p.67-68, n.3. Justice Stewart reasoned that:

> "[E]ven if there were some breaches of the representation duty that are not unfair labor practices under the NLRA, 10(b) is the proper source for determining when claims of breach of duty must be raised. For that limitation period is a clear indication of Congressional judgment of when claims of a very similar or identical character must be brought."

Justice Stewart's analysis, we submit, indeed is persuasive.

> "It is well established that in determining what limitations period to apply to a federal cause of action, that the court's task is to ascertain Congressional intent. When state limitations periods have been followed for federal claims, it has been because the court has ... inferred from Congress' failure to specify a limitations period]. Congress intended that local time limitations should apply."

Occidental Life Ins. Co. v. EEOC, supra, 434 U.S. at p. 367; and it makes no sense, as Justice Stewart explained in Mitchell, to "assume

here that Congressional silence reflects an intent to apply state statutes of limitations to a fair representation claim.[2]

This is not a situation in which Congress has expressly created a cause of action but failed to state the applicable limitations period. Here Congress has not expressly legislated a fair representation cause of action; rather, the cause of action has been judicially

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[2] Concededly, the terms of 10(b) are directed to the administrative procedures provided by Congress to resolve unfair labor practices. But the fact that Congress did not provide a limitations period for a judicially enforced labor action later found implied in the NLRA is not comparable to a Congressional failure to establish a time limitation for an action it expressly creates by statute. Cf. Occidental Life Ins. Co. v. EEOC, 432 U.S. 255-57. It indicates it cannot reasonably be assumed here that the Congressional silence reflects an intent to apply to state statutes of limitations for an action based in part on rights and obligations traceable to the NLRA. (Ibid., at 451 U.S. 68 n.4;emphasis added.)"

implied from the NLRA.[3] The absence of an express statute of limitations in the NLRA for the implied fair representation cause of action is, thus, hardly surprising, and it surely provides no basis for inferring that Congress intended state limitations to apply. Moreover, it is important to recall that the fair representation cause of action has been implied from the NLRA on the same theory that underlies all implied causes of action: that Congress intended to create the private remedy. Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 99 (1981). Touche Ross & Co. v. Redington, 442 U.S. 560, 568. Transamerican Mortgage Advisors v. Lewis, 441, U.S. 11 (1980).

[3] This court has used federal statutes of limitations to other judicially implied causes of action. McAllister v. Magnolia Petroleum, 357 U.S. 221, 228, Brennan, J., concurring. See also Note--Limitations Borrowing in Federal Courts, 77 Michigan Law Review, 1133, 1134, 1148 (1979).

The same reasoning that has led the courts to conclude that in enacting the NLRA, Congress impliedly intended to create a cause of action of breach of the duty of fair representation compels the conclusion that Congress intended to apply to that cause of action the same limitations period that the legislation expressly applies to all causes of action it expressly creates: the six months limitations period of 10(b). To repeat Justice Stewart's words: "that limitations period is clear indication of Congress' judgment of when the claims of a very similar or idential character must be brought."

Indeed, any other conclusion would lead to the anomalous result of a different limitations period being applied to the same claim, depending on whether the employee elects to pursue the claim before the NLRB or the courts. Moreover, Justice Stewart noted, decisions of the NLRB and of the Courts of Appeals make it

clear that a fair representation claim is presented to the NLRB for resolution as an unfair labor practice, the six months limitations period of 10(b), by its terms, is applicable. There is no basis for attributing to Congress an intent to create fifty different and expansive as well as restrictive limitations periods determined by state law when the very same claim is presented in court rather than before the Board.

While the breach of contract claim is enforceable under §301 of the Labor Management Relations Act of 1947, the alleged conduct of Anchor in terminating Del Costello's employment for refusing to drive an unsafe truck could be viewed as an unfair labor practice under the NLRA also. See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962). See also Vaca v. Sipes, 386 U.S. at 183, 196, fn. 18. Hines v. Anchor Motor Freight, 424 U.S. 554, 562 (1976) and

Labor Law Journal, August 1982, pp. 483-486, fn. 3, "Duty of Fair Representation for Statute of Limitations in Fair Representation Cases," by J.E. Grenig, Marquette University Law School.

Accordingly, Del Costello's claims against the union and the company are by their very nature individual, yet interrelated, if not interdependent.

> "To prevail against either the company or the union, petitioner must not only show that their discharge was contrary to the contract, but must also carry the burden of demonstrating the breach of duty by the union."

Hines v. Anchor Motor Freight, 424 U.S. 554, 570, 571 (1976). Thus, it can be demonstrated that the hybrid Del Costello suit arising out of the arbitral process when compared to a Hoosier claim does not resemble a common-law action for breach of contract, but is derived from a synthesis of §301 of the LMRA and the NLRA, as amended, which, under §10(b), contains

a limitations period of six months for initiating unfair labor practices, and for the following reasons should be the applicable limitations period governing suits such as Del Costello's.

Del Costello's case, unlike Hoosier, involves those consensual processes that federal labor law is chiefly designed to promote, namely -- the formation of collective bargaining agreements and the private settlement of disputes under it -- which have broken down. Hoosier Cardinal, supra, 383 U.S. 702, and Mitchell, supra, 451 U.S., at p. 66, Stewart, J., concurring opinion.

Therefore, at the outset, the essence of this lawsuit is shaped by NLRA principles designed to serve the goals of a functioning collective bargaining relationship and sharply differs from a common-law contract damage suit.

In addition, several policy considerstions require use of the NLRA limitations period

contained in 10(b). This Court, in Vaca, supra, established individual substantive rights through a hybrid cause of action that is exposed to the danger of extinction by the application of state arbitral statutes of limitations such as Maryland's 30-day limitation period, §3-224(a) of Courts and Judicial Proceedings Article of the Annotated Cose of Maryland.[4]

Justice Stewart, in Hoosier, supra, by way of dicta, fn. 9, 383 U.S., at p. 707, strongly hinted that state statutes of limitation which were either too long or too short

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[4] 1. Thirty states and the District of Columbia have a 90-day statute of limitations. 2. Three states have longer statutes than 90 days: (a) California has 100 days; (b) New Hampshire has 1 year; (c) Missouri has 1 year. 3. Six states have no time limitation whatsoever, including Vermont, Virginia, West Virginia, North Dakota, Tennessee, and Georgia. 5. One state has a limitation period for the term of court: Nebraska. (See UPS v. Mitchell, 451 U.S. 63, 64 - fn. 5).

would not comport with federal policies controlling 301 actions such as, for example, 60-day statute governing wages.[5] However, direct appeals by a company or union to vacate an illegal award[6] within the context of an appropriate

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[5] "Other questions would be raised if this case presented a state law characterization of a 301 suit that reasonably described the nature of the cause of action, but required the application of an unusually short or long limitation period, such as New Mexico's 60-day statute of limitations governing wages."

[6] Grounds upon which the Court, in a direct appeal, may intervene to set aside or vacate arbitral awards exist where (1) the arbitrator has fully exceeded the scope of statutory authority, either because (a) the award follows an illegal act, citing Glendale Mfg.Co. v. Local 520 ILUG, 228 F.2d 936, 6th Cir.(1960), or (b) the award violates public policy; Black v. Cutter Laboratories, 43 CA 2d 788, or (c) where the award draws its essence outside the collective bargaining agreement, U.S. Steel Workers v. Warrior and Gulf Navigation Co., 363 U.S. 574; Torrington Mfg. Co. v. Metal Products Workers Local, 362 F.2d 677; Ludwig-Harold Mfg. Co. v. Fletcher, 405 F.2d 1123, or (d) where the arbitrator was personally actuated by fraudulent or corrupt motives. In all these cases, the courts do not review the merits of the award or the request of the union or the

limitations period are markedly different than the initiation of a hybrid suit, as in the present case. In the former, the parties, who are usually represented by counsel or experienced labor management personnel, and being familiar with the proceedings, preserve their rights by filing an appeal within the statutory period as a matter of course. However, in the latter case, the hybrid action is an entirely different species of litigation. Under the labor management contract and rules of procedure of the Eastern Conference and Teamster constitution, as in the Del Costello case, a lawyer is absolutely prohibited from representing a claimant before the joint committee. The Eastern Conference rules of procedure prohibit any party unassociated either with the company

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6 - cont'd:
company, but simply determine whether the arbitrator acted within the perameters of his authority and granted both parties a fair hearing.

or with the union for a period of 18 months from representing either the company or the union at a discharge meeting. From a legal as well as a practical standpoint, the employee must rely upon his business agent to investigate and then present his claim at the arbitral hearing. When a breach of the fiduciary duty arises during the course of this representation, as in the instant case, an aggrieved employee requires at least six months within which to recognize, investigate, and thereafter pursue his remedies through counsel. Often a hostile business agent in tandem with a corrupt employer combine in a variety of ways to obstruct, if not prevent, an employee from obtaining vital and pertinent information necessary to apprise him of his rights, after which counsel must then determine whether the operative facts rise to the level of a breach of duty of fair representation. To require an

unemployed and uninformed layman to institute suit within three months, thirty days, or as little as one day, as required by arbitral statutes of at least 44 states, including Maryland, is palpably unreasonable. The application of such short statutory periods invariably operates to eviscerate the employee's substantive rights.[7]

Frequently, the unsuspecting employee will be deprived of his or her day in court before the employee has even sought legal

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[7] Wilson v. Iseminger, 185 U.S. 55, 62 (1902).

All statutes of limitations must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute should not bar existing rights of claimants without affording him this opportunity ; if it should attempt to do so, it would not be a statute of limitations but an unlawful attempt to extinguish rights arbitrarily whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.

advice.[8] This is particularly true where the limitations period is thirty days or less.

Another reason why 10(b) should be adopted is mandated by the need to promote stability in the arbitral process, which is at the very heart of the system of industrial self-government. U.S. Steelworkers v. Warrior Gulf Navigation Co., 363 U.S. 574, 578 (1960). Justice Stewart, in his concurring Opinion in Mitchell, supra, 451 U.S., at p. 68, addressed this policy in the following language:

> "Congress enacted 10(b) of the NLRA to protect continuing collective bargaining systems from delayed attack. The six month bar of 10(b) is designed to strengthen and defend the "stability" of bargaining relationships. Machinists v. NLRB, 362 U.S. 411, 425. The time limitation

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[8] Labor Law Journal, "The Duty of Fair Representation, the Statute of Limitations in Fair Representation Cases" (August 1982), by Jay E. Grenig.

reflects the balance drawn by Congress, "the expositor of the national interest", ibid., at 429, between the interest of employees in redressing grievances and vindicating (their) statutory rights", ibid., and the interest "in industrial peace, which is the overall purpose of the act to secure." Ibid. See also Local Lodge No.1424 v. NLRB, 362 U.S. 411, 428, 429 (1960).

Justice Stewart then concluded that these policies apply with equal force in the context of this hybrid cause of action:

> "In 10(b) of the NLRA Congress established a limitations period ultimately viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. The employees' interest in setting aside the "final and binding" termination of a grievance through the method established by the collective bargaining agreement unquestionably implicates "those consentual processes that federal labor law is chiefly designed to promote -- the formation of the

agreement and the private settlement of disputes under it." Hoosier, 383 U.S., at p. 702. "Accordingly, the need for uniformity among procedures followed for similar claims; ibid.,[9] as well as the clear Congressional indication of the proper balance between the interest at stake, counsels the adoption of 10(b) of the NLRA as the appropriate limitation period of law suits such as this."

Finally, we submit that the continuing use of state arbitral statutes under the present state of law has resulted in chaos as well as unnecessary appellate litigation because six states (App. 58) have absolutely no time limitation in their arbitral statutes for vacating arbitral awards.[10] Courts in these states are faced with the choice of selecting

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[9] Title VII, Civil Rights Act of 1964, 42 USC 2000(e)-5(e). Age Discrimination in Employment Act, 29 USC 626(c).

[10] Tennessee, West Virginia, Virginia, North Dakota, Vermont, and Georgia.

either the state tort statute or the state contract statute, thereby doing violence to the policy in Mitchell, supra, which mandates rapid resolution of labor disputes. Ten states have enacted arbitral statutes[11] (App. 58) which by their terms are expressly inapplicable to labor disputes. The United States Court of Appeals for the Sixth Circuit has adopted 10(b) to a fair representation case. Badon v. General Motors Corp., 679 F.2d 93, 6th Circuit (1982). It offends logic to put the courts in these remaining nine states to the Hobson's Choice of applying their arbitral statutes which effectively deprive the employee of his day in court, or alternatively selecting the tort or contract statute that flouts the rapid resolution policy enunciated in Mitchell, supra. Moreover, in

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[11] Alaska, Arkansas, Idaho, Kansas, Louisiana, Maryland, South Carolina, Texas, Washington, and Michigan.

the vast majority of the remaining states, these arbitral statutes were enacted, either prior to the development of the fair representation doctrine or for the purpose of resolving commercial disputes, and state legislatures did not consider the policies underlying the fair representation doctrine.[12]

As a consequence, when a court is required to select amongst and between the statutes, confusion and chaos abounds. The adoption of the six month limitation period contained in §10(b) will establish a definite, certain, and uniform time period and will operate to eliminate

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[12] Alabama Code, 6-6-15, enacted Title 7 §8, §2 (1940). Georgia Code Ann. 9-9-51, enacted 7-219-7-220 (1933). Nebraska Rev. Stat. 25-2114, enacted C.S. 9183 (1929). New Jersey Stat. Ann. 2A-24-7, enacted C.134, §7 (1923). New York Civil Procedure L.R. 7511, enacted L. 1937 C.341 (1937). N.D. Century Code Ann. 32-29-10, enacted 8336 (1913). Oregon Rev. Stat. 33.310, C.86, §5 (1925). Rhode Island 10-3-15, enacted P.L. 1929, Chapter 14J8, §12. Tennessee Code Ann. 29-5-112, 29-5-13, enacted Ann. 9375 (1932). West Virginia 55-10-3, enacted L.108, §1 (1923).

these problems.

If this Court rejects 10(b) of the NLRA, we submit that the appropriate statute of limitations should be the general tort statute for both the company and the union. We subscribe to the theory that once the breach of duty of fair representation occurs, it effectively taints the entire arbitral process, rendering the arbitral award a nullity. Furthermore, a decision by this Court establishing the longer period of limitations for the union and a shorter period for the company, as in Steelworkers v. Flowers, 671 F.2d 72, Second Circuit (1982), would invariable undercut the employee's remedy for damages. In Vaca, supra, the right to recover back pay, pension benefits and seniority, if not the job itself, represents substantially all of the relief available to the employee which can only be recovered against the company. Thus, a limitations period that

that would keep the claim alive against the union while at the same time terminating the right against the company, serves little or no purpose when the claim against the company is barred.

II. UPS v. MITCHELL SHOULD BE APPLIED PROSPECTIVELY ONLY.

Should the Court reject Del Costello's contention that §10(b) provides the appropriate limitation period for his claims against Anchor and Local 557, it will then be necessary to reach the question whether the rule of UPS v. Mitchell should be applied retroactively to bar this action. The complaint was filed in March 1978, over three years before Mitchell was decided, No effort was made to meet the arbitral statute in light of the almost universal application of contract or tort statutes to cases like this one.

The principles governing retroactive

application of civil decisions were formulated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and reaffirmed last term in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (June 28, 1982). Three considerations are pertinent:

> First, whether the holding in question "decided an issue of first impression whose earlier resolution was not clearly foreshadowed" by earlier cases; second, "whether retrospective operation will further or retard the operation of the holding in question; and third, whether retroactive application "could produce substantial inequitable results" in individual cases. Northern Pipeline, supra, at 2880.[13]

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[13] In Chevron, the Court recognized an alternate consideration to the first element set forth in Northern Pipeline, where the decision overruled "clear past precedent upon which litigants may have relief". Although Del Costello relied on numerous appellate and other decisions which used contract or tort limitation periods, he recognizes, with hindsight provided by UPS v. Mitchell, that most did not involve challenges to arbitrated grievances. Similarly, although plaintiff thought that Hoosier Cardinal had expressly disapproved "excessively short" statutes as sixty days, this was dictum and thus not "clear past precedent."

Examining these factors in turn, it is clear that a retroactive application of UPS v. Mitchell would be improper.

1. The Application of an Arbitral Period Was an Issue of First Impression Whose Resolution Was Not Clearly Foreshadowed.

Although this Court had never considered the possible application of arbitral limitation periods to suits under §301 before Mitchell, it did address the limitations periods under §301 in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966). There, the Court rejected the employer's argument for the six-month limitations period set forth in §10(b) of the National Labor Relations Act. Instead, the appropriate period for each case was to be "borrowed" from the state limitations period which is applied to the closely analogous causes of action.

Informed by the national labor policy

favoring expeditious resolution of disputes, the Court ruled that the six year period for contracts not in writing was the most closely analogous Indiana limitation period. The Court warned, however, that should the most closely analogous state limitation period be "unusually short or long", citing a New Mexico statute allowing sixty days, then "other questions would be raised ... See Campbell v. Haverhill, 155 U.S. 610, 615 (1895)." Hoosier Cardinal, 383 U.S., at p. 707, n. 9. On the cited page, in turn, the Court had indicated that a state limitation period which failed to give a party a reasonable time to sue would not be borrowed. The reasonable inference was that the Court deemed sixty days to be unusually short and would not countenance its application to an action under §301.

During the following fifteen years between Hoosier Cardinal and Mitchell, most courts

of Appeals had the opportunity to consider the appropriate limitation period for §301/fair representation actions, and almost every one determined that the state tort or contract periods were most closely analogous.[14] Similar results were reached in the district court.[15]

It was not until 1976 that this Court decided that §301/fair representation actions could be filed after a final and binding decision

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[14] DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir., 1970) (tort); Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir., 1970) (contract); Kennedy v. Wheeling Pittsburgh Steel Corp., 81 LRRM 2349 (4th Cir., 1972) (contracts); Sanderson v. Ford Motor Co., 483 F.2d 102 (5th Cir., 1973); Gallagher v. Chrysler Corp., 613 F.2d 167 (6th Cir., 1980) (tort); Butler v. Teamsters Local 823, 514 F. 2d 442 (8th Cir., 1975)(contract). See also Price v. Southern Pacific, 586 F.2d 750 (9th Cir., 1978) (right created by statute).

[15] E.G., Mikelson v. Wisconsin Bridge & Iron Co., 359 F.Supp. 444 (WD/WIS 1973); Grant v. Mulvihill Bros. Motor Serv., 428 F.Supp. 45 (ND/ILL. 1976) (contract); Howard v. Aluminum Workers, 418 F.Supp. 1058 (ED/VA 1976) (tort statute applied to action against union only).

had been made on a grievance prosecuted by the union. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).[16] Thus, the question of the limitation period applicable to this category of cases has arisen less frequently. Nevertheless, most courts borrowed the same state statutes as for other §301/fair representation actions.[17] Although there were a few district court decisions applying state arbitration periods,[18] it

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[16] Although the limitations issue was not raised in Hines, plaintiffs had sued approximately two years after the adverse decision, long after the Ohio arbitration statute had run.

[17] Mitchell v. United Parcel Service, 624 F.2d 394 (2d Cir., 1980), rev'd, 451 U.S. 56 (1981); Smart v. Ellis Trucking Co., 580 F. 2d 215 (6th Cir., 1978); Warren v. Teamsters, 544 F.2d 334 (8th Cir., 1976); Brooks v. Southwestern Transp.Co., 97 LRRM 2616 (ND/TEX, 1978); DeVries Interstate Motor Freight, 91 LRRM 2764 (ND/O, 1976); Lehto v. Underground Constr. Co., 96 LRRM 2337 (Calif. Ct. App. 1977).

[18] E.g., Barbarino v. Anchor Motor Freight, 421 F.Supp. 1003 (WD/NY, 1976); De Lorto v. UPS, 401 F.Supp. 408 (D/MASS, 1975).

was not until several months after Mitchell was decided in the Court of Appeals that the first and only Court of Appeals decision approving that rule was issued.[19] Thus, although Mitchell involved an issue of first impression in this Court, that decision reversed the weight of lower court authority. Singer v. Flying Tiger Line, 652 F.2d 1349 (9th Circuit., 1981); Kennard v. UPS, 531 F. Supp. 1139 (ED/MICH, 1982).

The district court below ruled to the contrary because it deemed Mitchell not to be a "case ... of first impression in the same sense" as was involved in Chevron Oil. Rather, "Hoosier Cardinal has established some general principles and Mitchell applied them." It believed that decisions must be applied retroactively unless they involve "a clear break with

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[19] Liotta v. National Forge Co., 629 F. 2d 903 (3d Cir., 1980).

the past", and that a well-informed or reasonable belief about the state of the law would not be sufficient. (Petition for Writ of Certiorari, B-23)

This view is not correct. It is true that in Chevron Oil the decision applied prospectively overruled previous decisions by the Fifth Circuit and was, at least in part, decided in the absence of previous decisions by this Court in the same area of the law.[20] However, a question of first impression may be presented even when there are many previous decisions which developed principles which are, for the first time, applied to the particular

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[20] Rodrigue v. Aetna Casualty Co., 395 U.S. 352 (1969), addressed two issues: whether the Lands Act adopted state law principles, and whether it applied to artificial drilling structures on the high seas. Only the former question was decided in the absence of previous decisions by the Court.

issue before the Court. For example, last term in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 50 U.S.L.W. 4892 (June 28, 1982), the Court applied the principles of such cases as United States v. Raddatz, 447 U.S. 667 (198); Crowell v. Benson, 285 U.S. 22 (1932), and Ex Parte Bakelite Corp., 279 U.S. 438 (1929). Similarly, in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), the Court withheld retroactive application of its construction of Government Employees v. Windsor, 353 U.S. 364 (1957), in light of NAACP v. Button, 371 U.S. 415 (1963). Accordingly, the fact that the Court, in Mitchell, applied the principles of Hoosier Cardinal is no reason to deny that it was a case of first impression.

Nor was the District Court correct in requiring more than a "reasonable belief" on Del Costello's part. The first element of the

Chevron Oil test for prospectivity is met unless the resolution of the question was "clearly foreshadowed". 404 U.S., at 106. See also Northern Pipeline, 50 U.S.L.W., at 4902. Indeed, in England v. Louisiana Medical Examiners, prospective application was granted precisely because the plaintiff's views were "not unreasonable". 375 U.S. at 422.

The reasonableness of Del Costello's reliance on a three year period was expressly found by the District Court (Petition for Writ of Certiorari B-23) and the foregoing discussion of the case law supports that finding. But the best indication of Del Costello's reasonableness, the best support for our argument that Mitchell was not "clearly foreshadowed", may be found by reviewing the course of litigation of this action before Mitchell was decided.

The complaint in this case, which was filed on March 16, 1978, revealed on its face that the joint committee had rejected Del Costello's grievance well over thirty days before Local 557 answered on April 10, 1978, but did not raise the defense that the suit was time-barred (JA 34-43), which was probably justified because the Maryland arbitral statute in §3-206(b) of the Courts and Judicial Proceedings Article is expressly inapplicable for labor disputes. Anchor Motor Freight did mention the defense of limitations in its answer dated May 21, 1978. (JA 52, 53) Yet, despite the fact that both defendants filed motions to strike plaintiff's jury demand on May 1 and 3, 1978, neither pursued the limitations issue with a motion to dismiss. (JA iii, iv, v)

For the thirty-two months following

service of the complaint the parties engaged in extensive discovery (900 pages from seven witnesses, over two hundred exhibits, and several sets of interrogatories). Del Costello is not aware exactly how much resources defendants expended on the case, but doubts it is less than the $7,500 he has been required to pay for the costs of the proceedings, exclusive of counsel fees which have not been paid. Yet, despite these substantial expenditures and despite the great sophistication of defendants' counsel, who are labor specialists -- indeed, union counsel teaches labor law at the University of Maryland School of Law -- neither sought to avoid the costs by raising the limitations defense.[21]

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[21] The leading scholarly comments on limitations in these cases did not even allude to the possible application of arbitral statutory periods. Note, Statutes of Limitations

On October 14, 1980, this Court granted certiorari in Mitchell. 449 U.S. 898. One month later both defendants moved for summary judgment. Only then did the possibility of victory on the statute of limitations defense seem sufficient to warrant the effort required to brief it. The District Court denied summary judgment in all respects except the availability of punitive damages. (Petition for Writ of Certiorari B 11-15) It recognized that there was a division of authority on the limitations question, but found the Second Circuit's reasoning in Mitchell "more persuasive". (Petition for Writ of Certiorari B-10)

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21 cont'd:
Governing Fair Representation Actions Against Union When Brought With §301 Action Against Employer, 44 G.W.U.L. Rev. 418 (1976). The following are legal treatises:
B.N.A., The Developing Labor Law -- The Courts, The Boards, The Natl. Labor Relations Act, Cum. Supp. 1971-1975, p. 398, 399, and 1977 Supp., p. 235; Fed. Regulation of Employment Service, Ch. 15, §57 (1978); Gorman, Basic Text on Labor Law, Ch. 31 (1976),p.724, 725.

After Mitchell was decided, defendants renewed their motion and the District Court ruled that this action was time-barred. (Petition for Writ of Certiorari B 16-29)

This Court's discussion of "unusually short" limitation periods, the weight of pre-Mitchell authority (including the pre-Mitchell decision in this case), and the failure of defense counsel to raise the issue before certiorari was granted in Mitchell, all support the District Court's finding that Del Costello's belief that three years were permitted before filing suit was reasonable. Accordingly, the "first impression" clearly foreshadowed element of the Chevron Oil test is satisfied.

2. Retroactive Application of Mitchell Will Not Further Its Operation, But Would Retard the Operation of the National Labor Policy.

The second consideration under Chevron Oil is whether retroactive application of a new rule will further or retard its operation. Of course, in a certain sense any rule will be "furthered" by every application; thus, the question must be whether the underlying policies will be furthered or retarded. Thus, for example, in Chevron Oil the Court noted that the underlying statute construed in Rodrigue was intended by Congress to provide employees with a more effective remedy for personal injuries. Accordingly, even though the Rodrigue decision required application of a short statute of limitations, the Court applied it prospectively in order to effectuate the underlying statutory policy. Here, the statutory policies favoring an arbitral limitation period will not be furthered, and the underlying duty of fair representation will be substantially disserved by retroactive application of Mitchell.

The reason given by the Court for adoption of the arbitral period was that it would encourage the rapid disposition of labor disputes, and in particular would expedite the finality of grievance decisions which interpreted critical terms in the collective bargaining agreement lest they be called into question several years later. UPS v. Mitchell, 451 U.S. 56, 63-64 (1981). Yet, the only employees who will benefit from prospective application are those who filed their actions before April 21, 1981. Accordingly, retroactive application of Mitchell cannot encourage employees to file their actions more quickly. Indeed, Del Costello himself filed only a few months after his grievance was rejected, which certainly comports with the interest in rapid disposition.

Moreover, retroactivity would be a serious

disservice to the national labor policy upon which Mitchell was founded. This Court has repeatedly recognized the strong interest which employees have in protection against unfair treatment by their exclusive representatives. E.g., Hines v. Anchor Motor Freight, 424 U.S. 554 (1976). Indeed, the duty of fair representation and the concomitant right to sue employers when the duty has been violated were developed in order to avoid the serious constitutional questions which would otherwise be raised by exclusive representation. Vaca v. Sipes, 386 U.S. 171 (1967). Mitchell was not intended to foreclose that constitutionally required remedy, but only to require that it be invoked promptly, if at all.

Yet, if Mitchell is applied retroactively, the effect will be totally to destroy any opportunity for resolution of §301 claims on

the part of employees who had no opportunity to be guided by the decision. In these circumstances, the constitutional questions avoided by the Vaca line of cases will be presented. This consequence would surely retard the national labor policy.

3. Retroactive Application Would Be Extremely Unfair.

The final aspect of the Chevron Oil test for prospectivity is equity -- whether retroactive application could produce substantial inequitable results in individual cases. This element is surely present here. If Mitchell is applied to this case, Del Costello will lose any opportunity to contest his discharge from employment, despite the fact that he filed his complaint more than two-and-one-half years before the expiration of the limitation period he believed to be applicable. (JA 158, 159, 164, 165)

This Court's decisions have consistently distinguished between decisions which extinguish a cause of action and those which simply increase or decrease the available remedies, finding that the former warrant prospective treatment. Chevron Oil, for example, not only emphasized the importance of preserving a plaintiff's right to a day in court, but confined its holding to the effects of Rodrigue on the statute of limitations. 404 U.S. at 108-09, and n. 10. Indeed, the Court has carved out an equitable exception to the rule of United States v. Schooner Peggy, 1 Cranch 103 (1801) (decisions are always applied retroactively to cases pending on appeal at the time of decision), for those decisions which extinguish a cause of action. Gulf Offshore Oil Co. v. Mobil Oil Corp., 453 U.S. 475, 486, n. 16 (1981).

Retroactive application would be particularly unjust in light of the practical realities

facing employees who seek redress of violations of their rights by their employers and unions. Unlike these defendants, who normally have specialized counsel on retainer to advise them when litigation becomes necessary, employees tend to have only the most sporadic contact with lawyers, and then usually with respect to non-labor matters. To the extent that they take any legal action with respect to employment, they normally rely on their union's counsel. Moreover, the great majority of attorneys who keep track of developments in the §301/ fair representation area are retained by employers and unions, and thus are not available to advise union members how to enforce their rights.

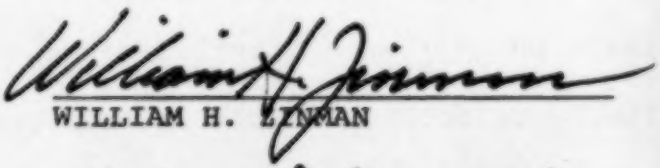
However likely it may be that union and employer counsel could have forecast the result in Mitchell (as they did not in this case), it is beyond belief that a union member would have

(1) concluded that he had enforceable rights; (2) found a lawyer who was willing to represent him; (3) raised enough money to pay the lawyer; (4) had that lawyer do sufficient legal and factual research to warrant litigation and to prepare the complaint; and (5) had that lawyer determine in the course of his or her research that an arbitral limitation would likely be applied -- all in the space of the thirty days allowed by the Maryland statute! In these circumstances, all considerations enumerated in Chevron Oil militate in favor of prospective application of Mitchell, and the decision below should be reversed on that ground.

CONCLUSION

For the aforegoing reasons, the Petitioner respectfully requests this Court to reverse the judgment of the Court of Appeals and to direct the Court below to order a trial on the merits in this case.

Respectfully submitted,



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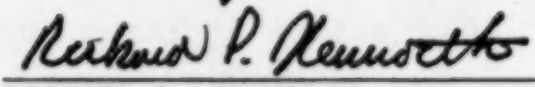

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APPENDIX A

STATE STATUTES OF LIMITATIONS GOVERNING ACTIONS TO VACATE ARBITRATION AWARDS

Six states have no time bars in arbitral statutes. Georgia Code 9-9-51, North Dakota Century Code Ann. §32-29-10, Tennessee Code Ann. §29-5-112 and §29-5-113, Virginia Code §8-01-579 -- each county in the State has different time lengths for vacating awards -- West Virginia Code §55-10-3. Vermont (no statute).

Ten states have arbitral statutes that are expressly inapplicable to labor disputes. Alaska State Statutes §.09.043.010, Arkansas State Statutes §34-511, Idaho State Statutes §7-901, Kansas §5-401, Louisiana Ch. 9.4201, Maryland Courts and Judicial Proceedings Article 3-206(b), Michigan General Court Rules 769.9(2), South Carolina §15-47-10 b(2) (1980 edition), Texas Rev. Civ. Stat. Ann. Title 10,

Art. 224, Washington RGW §7.04.010.

Nine states have thirty days or less. Alabama Code 6-6-15 (10 days), Connecticut Gen. Stat. Ann. §52-420 (West) (30 days), Havaii Rev. Stat. §658-11 (10 days), Kentucky Rev. Stat. §417.017 -- Award shall be entered as the judgment of the court at least 10 days after copies of the award are delivered to the parties, unless on exceptions filed, it be set aside by the court --, Maryland Stat. Ann. Courts and Judicial Proceedings §3-224 (30 days), Massachusetts Gen. Laws Ann. Ch. 150c §11 (30 days), Michigan Gen. Court Rules 769 (20 days), Montana Code Ann. Amd. §23 C.12 (1979) -- Award has the effect of judgment after expiration of 5 days from filing award upon application of party and who also files an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least 4 days prior to such

application and as long as no order staying entry has been served --, Oregon Rev. Stat. §33.310 (20 days).